City of Lafayette Staff Report

For:	City Council
By:	John M Luttropp, Associate Engineer
Date Written:	July 18, 2008
Meeting Date:	July 28, 2008
Subject:	EBMUD Reimbursement Agreement for the Mount Diablo Boulevard Pathway from the Lafayette Reservoir to Village Center

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Introduction/Background

On April 28th the City Council accepted a proposal for the conceptual design of this pathway to include a straight 10-foot-wide pathway alignment with porous concrete surface. Informal landscaping between the pathway and the creek would be undertaken as a separate future project by the Creeks Committee. Staff's estimate of the project is $300,000 in construction cost including a 10% contingency.

EBMUD has reviewed this scope of work and has decided that it would prefer the project to be undertaken by the City with its own staff. EBMUD will agree to fund the construction cost up to $300,000 and engineering work up to $50,000. The City Attorney has drafted a reimbursement agreement to formalize EBMUD's contribution.

Staff seeks the Council's authorization to enter into a reimbursement agreement with EBMUD for the design and construction of the multi-use pathway. Upon your approval staff would also begin engineering work for the project in time to be constructed by December 2009.

Fiscal Impact

EBMUD has increased their initial funding commitment to the project up to the engineer's estimate of $300,000. In addition EBMUD has agreed to fund up to $50,000 in engineering services for the preparation of the project plans and specifications.

Recommendation

Authorize staff to enter into a reimbursement agreement with EBMUD.

Attachments

1. Reimbursement Agreement with EBMUD

AGREEMENT BY AND BETWEEN THE CITY OF LAFAYETTE AND THE EAST BAY MUNICIPAL UTILITY DISTRICT FOR PEDESTRIAN IMPROVEMENTS ALONG MOUNT DIABLO BOULEVARD

This AGREEMENT made and entered into this ____ day of July 2008, by and between the EAST BAY MUNICIPL UTILITY DISTRICT ("EBMUD"), a municipal utility district organized and existing under the laws of the State of California and the CITY OF LAFAYETTE ("City").

RECITALS

WHEREAS, EBMUD prepared a Draft and Final Environmental Impact Report ("EIR") for the facilities and improvements comprising its Water Treatment and Transmission Improvements Program ("WTTIP"); and

WHEREAS, the EBMUD Board of Directors certified the EIR and approved the WTTIP project on December 19, 2006; and

WHEREAS, the WTTIP project includes pipeline construction under Mt. Diablo Boulevard within the City of Lafayette and appropriate mitigation measures for this pipeline construction have been identified in the WTTIP EIR; and

WHEREAS, the City has concerns with the WTTIP project construction and has requested additional Pedestrian Improvements, herein called "Project" which consists of design and construction of 1,500 feet of a 10-foot wide raised porous concrete pathway on the south side of Mount Diablo Boulevard from Village Center to the entrance of the Lafayette Reservoir Recreation Area in Lafayette; and

WHEREAS, EBMUD recognizes the City's concerns and that the Project would mutually benefit EBMUD and the City, EBMUD agrees to share in the cost of the pedestrian improvements by providing up to $50,000 for engineering services and up to $300,000 for the Project construction; and

WHEREAS, the City agrees that additional monetary compensation will not be required as a condition of approval for any encroachment permits required for the Project-Level Elements of the WTTIP and in imposing conditions of approval for any such encroachment permits, the City will allow a minimum of 8 hours of construction (including mobilization and demobilization) per day at designated construction times as determined by the City; and

WHEREAS, the EBMUD Board of Directors authorized this agreement by Motion Number _____.

AGREEMENT

NOW, THEREFORE, the City and EBMUD mutually agree as follows:

1. California Environmental Quality Act (CEQA). The City agrees to be the "lead agency" as defined by CEQA and is responsible for all documentation and public notification required to implement this Project in compliance with CEQA.

2. Permitting. The City agrees to obtain all permits, regulatory approvals and reviews as necessary for construction of the Project. The City shall be the "applicant" and be responsible for permit compliance and all work required by the permits.

3. Utility Conflicts. The City shall be responsible for locating underground utilities, coordination and costs of said coordination for planned utility relocations and resolution of utility conflicts which may arise during construction as required for the construction of the Project.

4. Project Design. The City agrees to provide engineering services required for design of the Project. These design services shall commence upon execution of the agreement and be completed by December 2008. The City assumes all responsibility for the Project design.

5. Final Bid Documents. The City shall be responsible for signing and sealing the completed engineering drawings and preparation of construction specifications for the Project. The City agrees to prepare the final bid package for the project by April 2009.

6. Construction Contract. The City shall solicit bids for the Project. The City agrees to cause the Project to be performed in accordance with all laws and regulations applicable to public works of this type, including but not limited to the payment of prevailing wages in accordance with the Labor Code and any applicable competitive bidding requirements.

7. Project Award/Selection of Contractor. The City shall review all qualified bids and select the Project contractor on the basis of the lowest responsive and responsible bidder. City shall be responsible for the advertising, bidding, and award of the construction contract for the Project.

8. Contract Administration and Inspection. The City shall administer the construction contract for the Project and be responsible to the selected contractor for any progress payments or fees. The City shall provide Project inspection to assure compliance with the contract plans and specifications.

9. Payments for Project. The City is solely responsible for all costs whether anticipated or not, related to the implementation and construction of the Project

except as specifically stated in this Agreement. For engineering services, the City shall submit to EBMUD progress invoices documenting actual costs incurred for design. EBMUD shall reimburse the City within 30 days of receipt of invoices for the actual design costs up to $50,000. Upon commencement of construction, the City shall submit to EBMUD progress invoices documenting actual costs incurred for construction. Within 60 days of City's final acceptance of the Project construction, the City shall submit to EBMUD a final invoice. EBMUD shall reimburse the City within 30 days of receipt of invoices for the actual construction costs up to $300,000. Upon payment of the $300,000, EBMUD shall have no further obligation to the City for Project costs.

10. Accounting. The City shall be responsible for all accounting associated with construction of the Project. The City shall maintain accurate and complete records of all expenses throughout the construction period and these records shall be retained by the City for four years from the date of final invoice and will be available for inspection by EBMUD. The City shall be solely responsible for verifying certified payroll records, insofar as being required by law, and complying with all requirements of the California Department of Industrial Relations.

11. Indemnification. It is understood and agreed that neither EBMUD nor any officer or employee thereof is responsible for any damage or liability occurring by reason of anything done or omitted to be done by the City under or in connection with any work, authority or jurisdiction delegated to the City under this Agreement and relating to the Project. It is understood and agreed that, pursuant to Government Code Section 895.4, the City shall defend, indemnify and save harmless EBMUD, and all EBMUD officers and employees from all claims, suits or action of every name, kind and description brought for or on account of injuries to or death of any person or damage to property resulting from anything done or omitted to be done by the City under or in connection with any work, authority or jurisdiction delegated to the City under this Agreement and relating to the Project. Said indemnity relates to among other things, liability for inverse condemnation, nuisance, or trespass arising out of, or in connection with the Project, including the design, construction, inspection and maintenance thereof.

It is understood and agreed that neither the City nor any City officer or employee thereof is responsible for any damage or liability occurring by reason of anything done or omitted to be done by EBMUD under or in connection with any work, authority or jurisdiction not delegated to the City under this Agreement. It is understood and agreed that, pursuant to Government Code Section 895.4, EBMUD shall defend, indemnify and save harmless the City, and all City officers and employees from all claims, suits or actions of every name, kind and description brought for or on account of injuries to or death of any person or damage to property resulting from anything done or omitted to be done by EBMUD under or in connection with any work, authority or jurisdiction not delegated to the City under this Agreement.

Nothing in this Agreement is intended to affect the legal liability of either party as to third parties by imposing any standard of care different from the standard of care imposed by law.

12. Use, Ownership, Maintenance and Repair. The City shall, at its own cost and expense, be responsible for all future operation of the Pedestrian Improvements including repairs and ordinary and extraordinary maintenance expenses, including damages caused by natural disaster.

13. Coordination Efforts and Representatives. The City and EBMUD agree that the successful execution of the Project is dependent upon full and complete cooperation of the parties and their representatives. Therefore each party agrees to use its best and diligent good faith efforts to perform its obligation in a timely manner. The City and EBMUD shall each designate a representative to be responsible for receiving and delivering notices of any kind, obtaining information and stating the position of the respective party on any decision required by a party. All notices and correspondence to be delivered under this Agreement shall be addressed as follows, or as may be otherwise required by written notice from one party to the other:

CITY
Tony Coe
City of Lafayette
3637 Mt. Diablo Boulevard #210
Lafayette, CA 94549

EBMUD
Serge Terentieff
East Bay Municipal Utility District
P.O. Box 24055
Oakland, CA 94623

The City and EBMUD agree to use their best efforts to maintain the same individuals as representatives throughout the period of construction of the Project with a view towards the expeditious performance of the Project.

14. City's Schedule for Construction of the Project. Award of contract for construction of the Project is scheduled for June 2009. Contract completion is scheduled to occur by October 2009. For each day after October 2009 that the Project is not complete, the City shall assess liquidated damages against its contractor in an amount reasonably calculated to compensate EBMUD and the City for the delays. The City agrees to include a clause calling for such liquidated damages in its Project construction contracts. The amount of liquidated damages shall be determined by the City in its sole and absolute discretion. The City shall make payments to EBMUD in half the amount of liquidated damages collected under any such clause. In the event unanticipated conditions are encountered that cause a change to the above said award or completion dates, the City shall notify EBMUD of the new award/completion dates and the reasons for the change, in writing.

15. Jurisdiction. This Agreement and all matters relating to it shall be governed by the laws of the State of California.

16. Modifications. This Agreement shall be subject to modification or amendment only by the mutual, written agreement of both parties.

17. Assignment. This Agreement is not assignable, and shall be binding upon and inure to the benefit of the successors of the parties.

18. Integration. This Agreement contains the entire agreement between parties with respect to the Project and supersedes all prior understandings or agreements, oral or written, regarding the subject matter of this Agreement.

19. City's Right to Cancel. The City retains the right under this Agreement in its sole and absolute discretion to not put the Project out to bid, or to reject all bids and not proceed with the construction of the Project. In the event the City decides not to put the Project out to bid or to reject all bids and not proceed with the construction phase of the Project, the City shall remit to EBMUD any payments previously made to the City by EBMUD. However, the City shall not be responsible for reimbursing EBMUD for any costs associated with the design services.

20. EBMUD's Right to Cancel. EBMUD retains the right to cancel this Agreement except that so long as the City complies with the terms of this Agreement, EBMUD shall not have the right to cancel the design phase of this Agreement once the City has entered into consulting contract(s) for the Project design or cancel the construction phase of this Agreement once the City has formally put the Project out for public bid.

21. The Parties to this Agreement acknowledge that they have had the benefit of counsel prior to entering into this Agreement and have relied upon the legal advice of counsel. Each party further represents that the terms and conditions of this Agreement have been completely explained and that the terms and conditions were voluntarily accepted and agreed to by each party. The Parties further acknowledge that they have entered into this Agreement voluntarily, without coercion, based on their own judgment, and not in reliance on any representation or promise made by the other party other than those contained herein.

22. This Agreement, and each of the provisions hereof, is the product of negotiations between the Parties and their respective attorneys. Each of the Parties hereto expressly acknowledges and agrees that this Agreement shall not be deemed to have been prepared by or drafted by any particular party hereto. The rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement.

23. Should any part of this Agreement be declared by a final decision by a court or tribunal of competent jurisdiction to be unconstitutional, invalid or beyond the authority of either party to enter into or carry out, such decision shall not affect the validity of the remainder of this Agreement, which shall continue in full force and

effect, provided that the remainder of this Agreement can be interpreted to give effect to the intentions of the parties.

24. In the performance of this Agreement, time is of the essence.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first set forth above.

EAST BAY MUNICIPAL UTILITY DISTRICT

_____ Date: _____
Xavier J. Irias
Director of Engineering and Construction

Approved as to form and legality for EBMUD:

_____ Date: _____
Xanthe Berry

CITY OF LAFAYETTE:

_____ Date: _____
City Manager

Approved as to form and legality for City of Lafayette:

_____ Date: _____
City Attorney